SUPREME COURT, U. S.

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Supreme Court of the United States

OCTOBER TERM, 1963

No. 471

JUDY BOND, INC.,

Petitioner,

against

CHARLES KREINDLER, as Financial Secretary of BLOUSE AND WAISTMAKERS' UNION, LOCAL 25, I.L.G.W.U.,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE APPELLATE DIVISION OF THE SUPREME COURT OF THE STATE OF NEW YORK, FIRST JUDICIAL DEPARTMENT

EDWARD C. WALLACE,
Attorney for Petitioner,
60 East 42nd Street,
New York 17, N. Y.

Of Counsel:

ROBERT TODD LANG,
MARSHALL C. BERGER,
WEIL, GOTSHAL & MANGES.

INDEX

	PAGE
Petition	1
Citation to Opinions Below	2
Jurisdiction	2
Questions Presented	2
Statutes Involved	3
Statement	3
Manner in Which the Federal Questions Herein Were Raised	7
Reasons For Granting the Writ	8
1. The first question presented was decided contrary to the decisions of this Court	8
2. The second question presented is important in the administration of Federal law and the determination of the New York State courts thereon is contrary to Federal public policy	14
Conclusion	24
Appendix A	
Opinion in Penalty Clause Proceeding	1a
Appendix B	
Opinion in Health & Welfare Fund Proceeding	8a
Appendix C	
Orders Appealed From	11a

Table of Authorities

	PAGE
Allen Bradley Co. v. *Local No. 3*, 325 U. S. 797 (1945)	10
Greenstein v. *National Skirt and Sportswear Association, Inc.*, 178 F. Supp. 684 (SDNY 1959), appeal dismissed, 274 F. 2d 430 (2nd Cir. 1960)	12
Local 174 v. *Lucas Flour Co.*, 369 U. S. 95 (1962)	7
Local 453 v. *Otis Elevator Co.*, 314 F. 2d 25, 29 (2nd Cir. 1963)	14, 16
Poller v. *Columbia Broadcasting System, Inc.*, 368 U. S. 464, 473 (1962)	11, 14
Priebe & Sons v. *United States*, 332 U. S. 407, 412-413 (1947)	15, 16
Terry-Lee Sportswear, Matter of (Kreindler), 3 A. D. 2d 649 (1957)	13
White Motor Co. v. *United States*, 372 U. S. 284 (1963)	11, 13, 14

Statutes

Section 301(a), Labor Management Relations Act of 1947; 29 U. S. C. §185(a), 61 Stat. 156	3, 7
Section 4, Sherman Anti-Trust Act, 15 U.S.C. §4, 26 Stat. 309 as amended	3

Treatises

McCormick, Damages	17-18

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PETITION FOR A WRIT OF CERTIORARI TO THE APPELLATE DIVISION OF THE SUPREME COURT OF THE STATE OF NEW YORK; FIRST JUDICIAL DEPARTMENT.

JUDY BOND, INC. prays that a writ of certiorari issue to review the affirmance orders of the Appellate Division of the Supreme Court of the State of New York, First Judicial Department entered in the above entitled action on April 25, 1963 affirming the orders and judgments of the Supreme Court of the State of New York, County of New York entered on October 19, 1962. Said affirmance orders were rendered by the highest court of the State of New York in which a decision could be had by virtue of the order of the Court of Appeals for the State of New York denying Petitioner's motion for leave to appeal to that court entered on July 10, 1963.

Citation to Opinions Below

The opinions of Supreme Court, New York County are reported at 36 Misc. 2d 943, 234 N. Y. S. 2d 375 and 36 Misc. 2d 948, 234 N. Y. S. 2d 382 and are printed in appendices A and B hereto, *infra*, pp. 1a and 8a. The affirmance of these opinions by the Appellate Division, First Department was without opinion and is reported in 18 A. D. 2d 1138. The denial of petitioner's motion for leave to appeal to the Court of Appeals was without opinion and is reported in 13 N. Y. 2d 595.

Jurisdiction

The affirmance orders of the Appellate Division, First Department were entered on April 25, 1963. The orders and judgments affirmed was entered on October 23, 1962. The order denying petitioner's motion for leave to appeal to the Court of Appeals was entered on July 10, 1963.

The jurisdiction of this Court is invoked under 28 U. S. C. §1257(3).

Questions Presented

1. Was petitioner entitled to hearing on the merits to determine whether, as a matter of fact, the contract involved in the arbitration proceedings from which this action arose was used to violate the Federal antitrust laws?

2. Whether the award based upon Article 33(g) of the contract is void, as a matter of public policy, as the imposition of a penalty for a breach of contract.

Statutes Involved

Section 301(a), Labor Management Relations Act of 1947: 29 U. S. C. §185(a), 61 Stat. 156:

> "(a) Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without regard to the amount in controversy or without regard to the citizenship of the parties."

Section 1, Sherman Anti-Trust Act, 15 U. S. C. §1, 26 Stat. 209, as amended:

> "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal * * *."

Statement

Both actions herein were proceedings brought in Supreme Court, New York County upon motions and cross-motions to confirm and vacate certain arbitration awards. Both arbitrations arose under a collective bargaining agreement between the National Association of Blouse Manufacturers, Inc. (hereinafter referred to as the "Association"), a trade association of which petitioner Judy Bond, Inc. (hereinafter referred to as "Judy Bond") was formerly a member, and Blouse and Waistmakers' Union, Local 25, I.L.G.W.U. (hereinafter referred to as the "Union". The respondent is the Financial Secretary of the Union and in the proceedings herein he acted solely in its behalf. Accordingly, all future references to the Union will be considered as references to the respondent. For the benefit of this Court we are enclosing one copy of this contract.)

Under Article 32 of the contract, a member of the Association was prohibited from having any garments manufactured for it outside of its own shop or from purchasing any garments unless the firm who made the garment had a contract with either the Union or another local in its International (fols. 41-42). (All references to Folio number are to the Record on Appeal unless otherwise stated.) In addition, Article 32 also prohibited a member of the Association from sending out work to be made outside of its shop unless the "inside workers" and the workers of its regular contractors are fully supplied with work (fol. 43). Article 33 required members of the Asssociation to use only contractors who are either "designated" or "registered" contractors approved by the Union. Article 33 goes into copious detail about how these contractors are "designated" or "registered" (fols. 44-52). Other provisions of the contract regulated in detail the relationship between members of the Association and their contractors. Thus, Article 35 spells out at great length certain requirements with respect to cutters in a contractor's shop.

The last section in Article 33 reads as follows:

> "'Violations of Contractors' Provisions
>
> '(g) The parties acknowledge that should the Employer have any work performed in non-designated or non-registered contractors' shops, or purchase any garments contrary to the terms of this agreement, such violation would have an adverse effect upon the interest of the Union in the establishment and maintenance of the labor standards provided for in Union agreements in the industry. The parties also acknowledge that the damage to the Union upon such violations is difficult if not impossible of accurate ascertainment. Therefore, the parties agree to fix herein the basis for the amount of liquidated damages to be paid for each dozen

> of garments manufactured or purchased in violation of this agreement. They hereby agree that the damage shall be an amount equal to the sum of $1.00 per dozen of such garments. It is agreed that an award based upon such damages shall not be deemed a penalty or forfeiture' " (fols. 52-54).

The arbitration which was the subject matter of the Supreme Court, New York County proceeding bearing Index No. 12464/62 (hereinafter referred to as the "Penalty Clause Arbitration") concerned the Union's claim for damages under Article 33(g). The Union contended that it was entitled to such damages since Judy Bond used in part "non-designated" or "non-registered" non-Union contractors. This contention was upheld by the Arbitrator in his award (fols. 79-90).

At approximately the same time as the Union asserted its claim with respect to the Penalty Clause, it also asserted another claim for monies allegedly due under the Health and Welfare Fund clauses of the contract from Judy Bond. This arbitration was the subject matter of the Supreme Court, New York County proceeding bearing Index No. 13628/62 (hereinafter referred to as Health and Welfare Fund Award). The vast bulk of the Union's claim concerned monies allegedly due the Health and Welfare Fund based upon payments to non-Union contractors who employed non-Union employees. These employees, in no way, could possibly benefit from the Union's Health and Welfare Fund, yet their wages, the Union contended, determined how much money the Union's Health and Welfare Fund would receive (fols. 267-269). The Union's contentions were largely upheld by the Arbitrator in his award (fols. 244-258).

Prior to the commencement of both arbitrations, Judy Bond instituted an earlier proceeding in Supreme Court, New York County, bearing Index No. 2739/62 wherein petitioner sought to stay both arbitrations. This petition

was withdrawn pursuant to a stipulation between the attorneys for the parties, specifically signed and consented to by the Arbitrator, George J. Mintzer. The stipulation explicitly reserved to Judy Bond the right to contest the legality of any provision of the contract or any award entered thereon at a subsequent date, including on a motion to enforce, confirm, vacate or modify any award as if Judy Bond had not participated in the arbitration (fols. 29-30, 269-270; the stipulation is printed at fols. 73-78).

This stipulation was recognized by the Arbitrator in his awards. In both awards, he stated that "Judy Bond, Inc. reserves the right to challenge the legality of the collective agreement" (fols. 90 and 257) and hence his awards did not consider or rule upon the legality of the underlying agreement. Accordingly, Judy Bond has retained the right to argue any claim of illegality of the basic agreement or any part thereof in the proceedings which are the subject of this petition.

In both arbitrations, the parties hereto made various motion in Supreme Court, New York County to confirm and vacate the awards. The motions with respect to both arbitration awards came on to be heard before Mr. Justice Saul S. Streit. Mr. Justice Streit, in two opinions, denied Judy Bond's motions to vacate the awards and granted the Union's motions to confirm the awards without a hearing of any kind (fols. 199-219, 459-357). Subsequently, Mr. Justice Streit signed formal orders embodying the conclusions of his opinions and entering judgment on the awards (fols. 13-18, 226-233, see appendix C p. 11a).

Judy Bond appealed from these formal orders to the Appellate Division, First Department, but that court affirmed, without opinion, the decisions of Mr. Justice

Streit. The New York Court of Appeals denied Judy Bond's motion for leave to appeal to that court.

In the New York State courts Judy Bond, *inter alia*, made the following contentions:

1. Article 33(g) and the Health and Welfare Fund provisions, as enforced and applied, are illegal and invalid as violative of the antitrust laws of the United States and the public policy of the United States as expressed in such laws. Accordingly, both arbitration awards are invalid.

2. Article 33(g) is illegal as the imposition of a penalty for violation of a contractual provision in violation of the law of the United States and the public policy of the United States as repeatedly expressed by the courts of the United States. Accordingly, the Penalty Clause Award is invalid.

With respect to its first contention Judy Bond argued that it was entitled to a hearing to determine whether as a matter of fact said contention was correct.

Manner in Which the Federal Questions Herein Were Raised

Before each and every New York State court which considered these actions, either petitioner or respondent through its brief or memorandum of law called the court's attention to Section 301 and this Court's decision in *Local 174* v. *Lucas Flour Co.*, 369 U. S. 95 (1962) requiring state courts to apply Federal law in determining proceedings arising out of collective bargaining agreements. There was no specific mention of this requirement by any of the New York State courts considering the matter.

In its papers in both proceedings, Judy Bond alleged that the contract as enforced and applied violated the Sherman Anti-Trust Act (fols. 41-69 and 266-267). This contention was specifically rejected by Supreme Court, New York County in its opinion.

Reasons for Granting the Writ

1. The first question presented was decided contrary to the decisions of this Court.

In its petition to vacate the Penalty Clause Award, Judy Bond alleged that Articles 32 and 33 of the collective bargaining agreement were invalid under the antitrust laws (fols. 41-69). Likewise, in its cross-petition to vacate the Health and Welfare Fund Award, Judy Bond argued that the Health and Welfare Fund clauses were also illegal as violations of the antitrust laws in the manner in which they were enforced and applied (fols. 286-290). The cross-petition incorporated by reference Judy Bond's petition upon the Penalty Clause Award (fols. 266 and 267).

In summary, on its face Articles 32 and 33 restrict the freedom of employers who sign the collective bargaining agreement in their choice of contractors. Such an employer was required to use a contractor who had been "designated" or "registered" and hence had obtained Union approval. Any employer who refused to use a contractor approved by the Union was liable to the severe panalties of Article 33(g): namely, the payment of a penalty of a dollar per dozen on each garment made by a non-approved contractor (fols. 54-55).

Further, Judy Bond alleged that both Article 33(g) and the Health and Welfare Fund clauses were used arbitrarily in order to enforce adherence to an antitrust conspiracy existing between the Union, the Association and other employer associations. The Union, therefore, would apply the sanctions of Article 33(g) and the Health and Welfare clauses only against employers who refused to adhere to the terms of the antitrust conspiracy. Mean-

while, similar violations by employers who did adhere to the terms of the antitrust conspiracy were condoned and ignored (fols. 61 and 62, 287 and 288).

In particular, these specific arbitrations were brought only after Judy Bond had terminated its membership in the Association on December 11, 1961 and hence had refused to adhere to the terms of the antitrust conspiracy. Accordingly, the Union's motive in bringing the arbitration was not any concern about vindicating its contractual rights but rather was done in an attempt to coerce Judy Bond into remaining a member of the Association and adhering to the antitrust conspiracy (fols. 62-68, 288-290).

These statements are not only supported by the statements of Judy Bond but also by the actions of the United States Government. On March 11, 1959, the Union, the Association, and others were indicted by a grand jury of the United States District Court for the Southern District of New York for engaging in a conspiracy to violate the antitrust laws (fol. 56). On January 24, 1962 the Department of Justice of the United States filed a civil complaint in the United States District Court for the Southern District of New York against the Union, the Association, and others again alleging a conspiracy to violate the antitrust laws (fols. 56 and 57). (For the benefit of the Court, we are enclosing a copy of both documents. The material allegations of the indictment and complaint are summarized at fols. 57-59.)

The Petition points out that the allegations of the complaint and indictment concerning the Union's control of the members of the Association's choice of contractors indubitably refer to Articles 32 and 33 since these were the devices by which the Union was able to regulate

the persons who could be contractors for members of the Association. Similarly, Article 33(g) and the Health and Welfare Fund clause were used to penalize violators of the conspiracy and to deter would-be violators (fols. 59-62).

Judy Bond's case on this point is incomplete; primarily because the Arbitrator refused to allow Judy Bond to even subpoena or introduce evidence pertaining to these or other contentions (fols. 63-64, 272-277).

Supreme Court, New York County in its opinion herein agreed that "if the contractual provision was used for the purpose of enabling certain employers or businesses to monopolize the market and the Union was a co-conspirator with them", then these provisions might be invalid (fols. 201 and 202). The opinion on the Health and Welfare Fund Award adopted by reference the portion of the Penalty Clause Award opinion concerning the antitrust issue (fol. 356). Indeed that is merely a restatement of the rule of this Court in *Allen Bradley Co. v. Local No. 3*, 325 U. S. 797 (1945). But after conceding that Judy Bond had raised what might be a valid objection to the arbitration, the court below then stated "However, no competent proof to that effect has been submitted to the court" (fol. 202).

This conclusion completely misconstrues the function of a motion court on such a matter. What the court below did was to require anyone who desires to upset an arbitration upon the grounds of illegality under the antitrust laws, to prove by affidavits a *prima facie* antitrust case. Needless to say, such a party would be without benefit of any pre-trial depositions or discovery or even the right to subpoena witnesses. If he were fortunate enough to have documentary evidence to prove the alleged antitrust

conspiracy perhaps he would prevail, but if he did not, regardless of how meritorious his claim, he would, of necessity, lose.

The unfairness of this position has recently been highlighted by a series of decisions of this Court holding that antitrust issues could generally not be disposed of through a motion unless a *per se* violation is involved. Thus, in *Poller* v. *Columbia Broadcasting System, Inc.*, 368 U. S. 464, 473 (1962), this Court summarized the undesirability of deciding antitrust issues upon motion papers in the following language:

> "* * * We believe that summary procedure shall be used sparingly in complex antitrust litigation where motive and intent play leading roles, the proof is largely in the hands of the alleged conspirators, and the hostile witnesses thicken the plot. It is only when the witnesses are present and subject to cross-examination that their credibility and the weight to be given their testimony can be appraised. Trial by affidavit is no substitute for trial by jury which so long has been the hallmark of 'even handed justice'."

See also *White Motor Co.* v. *United States*, 372 U. S. 284 (1963).

Yet in effect, the decision of the court below held that trial by affidavit can be substituted for trial by jury if an arbitration is involved even where the arbitrator did not consider antitrust issues by express stipulation of the parties and the arbitrator. Once Judy Bond had alleged what was admittedly a *prima facie* case to vacate the awards herein, particularly when these allegations were supported by a United States Government criminal indictment and civil complaint, the court below should have

directed that the entire issue be sent to a hearing for determination.

The court below cited *Greenstein* v. *National Skirt and Sportswear Association, Inc.*, 178 F. Supp. 681 (S. D. N. Y. 1959), appeal dismissed, 274 F. 2d 430 (2nd cir. 1960) as authority for the proposition that the indictment and presumably the complaint did not constitute competent proof (fol. 202). The *Greenstein* case does not support this proposition. First, in the *Greenstein* case the union and the trade association there involved were not named in any indictment. The only relationship between the parties in the *Greenstein* case and any indictment was firstly that the collective bargaining agreement actually before the court was allegedly similar to the agreement here involved which was mentioned in a federal indictment, and secondly that the local union in the *Greenstein* case belonged to the same International Union as the indicted local union, the Union herein.

But more important, in the *Greenstein* case the plaintiff sought an injunction *prior* to a labor arbitration. The court held this drastic remedy to be unwarranted *at that time* and advised the plaintiff that he could raise the antitrust issues *after* the arbitration in the courts if and when an award was entered against him. Thus, the court in the *Greenstein* case told the plaintiff to follow the exact procedure followed by Judy Bond herein. After an arbitration award had been rendered, then the *Greenstein* case impliedly held an aggrieved party could test the validity of the award based upon illegality of the underlying agreement under the antitrust laws. Certainly, the indictment and complaint indicate that there is substantial basis for Judy Bond's allegations. In the face of such grave accusations by the United States Government

the least that can be afforded Judy Bond is a full and complete opportunity to prove its charges.

In fact, Judy Bond has never had such an opportunity before. Judy Bond did not have an opportunity to prove the existence of an antitrust conspiracy at the arbitration because all issues of illegality had been reserved for the courts. This reservation of any defense of illegality induced Judy Bond to withdraw its original motion to stay the arbitration on these grounds. In the court below, Judy Bond, like all litigants in a motion part, was restricted to the submission of affidavits and memoranda of law. It did not have the right to subpoena evidence, call witnesses, hold depositions, conduct discovery proceedings or enjoy any of the other rights customarily enjoyed by any party to a trial under either New York or Federal procedure. Restricting Judy Bond to affidavits virtually precluded it from proving any issue of fact, particularly an issue of fact concerning a violation of the antitrust laws.

The court below stressed certain cases apparently upholding the validity of the contract upon its face. But as the Appellate Division itself pointed out on the oral argument herein, such cases as *Matter of Terry Lee Sportswear (Kreindler)*, 3 A. D. 2d 649 (1957) merely held that the clauses here in question were not a *per se* violation of the antitrust laws. These cases, thus, do not affect Judy Bond's contention that an antitrust conspiracy exists *as a matter of fact* and this conspiracy wrongfully used the collective bargaining agreement. In *White Motor Co.* v. *United States*, *supra*, this Court held that it is precisely in cases where there are no *per se* violations that antitrust violations cannot be proved by motion papers and the question of the existence of an

antitrust conspiracy *as a matter of fact* must be referred to a trial.

In Judy Bond's papers in the court below and in the indictment and complaint in the criminal and civil actions now pending against the Union, the clauses here in issue were alleged to have been used as part of a conspiracy by which the contracting work of blouse jobbers was allocated among various contractors (fols. 56-62, 287-290). We submit that there is no case deciding this issue one way or the other. The only way this issue can be fairly resolved is to remand these proceedings for a hearing on the antitrust issues. A failure to do this will deprive Judy Bond of its day in court.

Accordingly, were the reasoning of the opinion below to prevail, a party to a contract which is used to violate the antitrust laws and which contain an arbitration clause would be precluded from questioning the validity of that contract unless he was fortunate enough to be able to prove by motion papers an antitrust law violation. In other words, an exception having no basis in reality would be carved out of the holding of this Court in the *Poller* and *White Motor* cases that antitrust issues cannot be disposed of on motion papers. Accordingly, we submit that the decision of the New York State courts is contrary to the decisions of this Court in *Poller* and in *White Motor*.

2. The second question presented is important in the administration of Federal law and the determination of the New York State courts thereon is contrary to Federal public policy.

The United States Court of Appeals for the Second Circuit in a recent case, *Local 453* v. *Otis Elevator Co.*, 314 F. 2d 25, 29 (2nd cir. 1963) held that under Section

301 violation of public policy is a valid bar to enforcement of an arbitration award pursuant to that section. Thus, that Court stated:

> "It is no less true in suits brought under §301 to enforce arbitration awards than in other lawsuits that the 'power of the federal courts to enforce the terms of private agreements is at all times exercised subject to the restrictions and limitations of the public policy of the United States. * * *' Hurd *v.* Hodge, 334 U. S. 24, 34-35, 68 S. Ct. 847, 852-853, 92 L. Ed. 1187 (1948). The public policy to be enforced is a part of the substantive principles of federal labor law which federal courts, under the mandate of Textile Workers Union of America *v.* Lincoln Mills, 353 U. S. 448, 77 S. Ct. 912, 1 L. Ed. 2d 972 (1957), are empowered to fashion. Cf. Local 174, Teamsters etc., *v.* Lucas Fleur Co., 369 U. S. 95, 82 S. Ct. 571, 7 L. Ed. 2d 593 (1962). Thus, when public policy is sought to be interposed as a bar to enforcement of an arbitration award, a court must evaluate its asserted content."

Likewise, it is fundamental that the imposition of a penalty for violation of a contract is against Federal public policy. This is well-illustrated by the case of *Priebe & Sons* v. *United States*, 332 U. S. 407, 412-413 (1947). That case applied Federal law and Federal policy since it involved a contract of an agency of the United States Government and hence the Federal courts were not bound by the laws and policy of any particular state. In that case, this Court threw out a liquidated damage clause in a *wartime* procurement contract in the following language:

> "It likewise is apparent that the only thing which could possibly injure the government would be failure to get prompt performance when delivery was due. We have no doubt of the validity of the

provision for 'liquidated damages' when applied under those circumstances. Under States *v.* Bethlehem Steel Co., 205 U. S. 105, 51 L. ed. 731, 27 S. Ct. 450, supra; Wise *v.* United States, 249 U. S. 361, 63 L. ed. 647, 39 S. Ct. 303, supra. And see Maryland Dredging & Contracting Co. *v.* United States, 241 U. S. 184, 60 L. ed. 945, 36 S. Ct. 545, Ann. Cas. 1918E 32; Robinson *v.* United States, 261 U. S. 486, 67 L. ed. 760, 43 S. Ct. 420. But under this procurement program delays of the contractors which did not interfere with prompt deliveries plainly would not occasion damage. That was as certain when the contract was made as it later proved to be. Yet that was the only situation to which the provision in question could ever apply. *Under these circumstances this provision for 'liquidated damages' could not possibly be a reasonable forecast of just compensation for the damage caused by a breach of contract. It might, as respondent suggests, have an in terrorem effect of encouraging prompt preparation for delivery. But the argument is a tacit admission that the provision was included not to make a fair estimate of damages to be suffered but to serve only as an added spur to performance. It is well-settled contract law that courts do not give their imprimatur to such arrangements.* See Kothe *v.* R. C. Taylor Trust, 280 U. S. 224, 74 L. ed. 382, 50 S. Ct. 142, 15 Am. Bankr. NS 62, supra; Am. L. Inst. Restatement, Contracts, Vol. 1, §339. All provisions for damages are, of course, deterrents of default. *But an exaction of punishment for a breach which could produce no possible damage has long been deemed oppressive and unjust.* See Salmond & Williams, Contracts, 2d ed. 1945, §202." (Emphasis supplied.)

By reading the *Otis Elevator* and *Priebe* cases together, we derive the following synthesis: A labor arbitration award imposing a penalty for a breach of contract is

"oppressive and unjust" and hence, will not be enforced as a violation of federal public policy.

Although there are many decisions of the Federal courts and countless more decisions of the State courts determining when a liquidated damage clause is illegal as the imposition of a penalty, there has never been any determination on this subject by this Court with respect to a collective bargaining agreement. Since collective bargaining agreements are now covered by Federal law this matter, we submit, now becomes one of importance to this Court.

If an admitted penalty clause is allowed to form the basis for an arbitration award which is enforced either by a Federal or state court, then the Federal policy against enforcement of penalty provisions for breach of contract will have been thwarted. Today parties seeking to insert penalty clauses into collective bargaining agreements are rarely unsophisticated enough to openly denominate them as penalties. Instead, the usual pattern is to camouflage their punitive aspects by referring to them as liquidated damage clauses and inserting boiler-plate language about the impossibility of determining actual damage. This, we submit, is what happened in the instant case. This, of necessity, forces a court to scrutinize carefully the actual intent of any clause which is contended to be a penalty clause. This was pointed out by a leading authority on the law of damages, Professor McCormick, in his treatise on the subject:

> "Since, as we have seen, the law's sole purpose in departing from its usual rule of enforcing agreements, when it declines to enforce agreements for penalties, is to avoid the extortion and injustice which a free power to stipulate damages would invite, the proper test of whether a particular stipu-

lation is a penalty' (that is, unenforceable) is whether, viewed as of the time of its making, it is reasonably proportioned to the probable loss which will ensue from a breach. This has not always been clearly perceived. In fact, the courts, in working out their system of protection against the oppressive results of contractual penalties, purported at first to justify this exceptional interference with contracts as in reality a following of the inner intention of the parties themselves. The test they said, was whether the parties intended a penalty or liquidated damages. Under the usual canons of interpretation of written contracts, the court would search out this intention only from its expression in the words of the contract. Soon, however, the courts were faced with oppressive and harshly extortionate agreements to pay anticipated damages, where the written contract itself provided that the agreement was intended as one for 'liquidated damages and not for a penalty'. After a period in which such expressions were given great weight, it has become settled that, even where these clear and unambiguous statements appear in the contract, the courts will nevertheless, where the amount agreed on is unconscionable, declare the agreement unenforceable as a 'penalty'. In the more modern decisions, the quest for intention has dwindled to this: If the parties at the time of the contract intended to make a 'genuine pre-estimate' of the probable damages, it will be enforced; otherwise not. However, the use in the contract of the words 'liquidated damages' or 'penalty' or their respective equivalents will be evidence to be considered by the judge in determining whether such a 'genuine pre-estimate' was attempted; yet it is obvious that the actual relation between the amount stipulated and the loss that was to be foreseen will ordinarily be the deciding factor on this question." (Authorities omitted.) McCormick, Damages, pp. 606-607.

If our contentions are correct that Article 33(g) is as a matter of law a penalty, then a determination by this Court will be of invaluable assistance to the Federal and state courts which must apply Federal law to the increasingly growing number of suits arising out of collective bargaining agreements. These courts will have guidelines on which they can base their determination of whether or not a given damage clause in a collective bargaining agreement is unenforceable as a penalty provision.

Article 33(g), we submit, presents this issue in clear relief. Under it a penalty of a dollar per dozen is exacted for each of a multitude of violations of the collective bargaining agreement. It is clear by its terms that Article 33(g) covers breaches of the provisions of Article 32 relating to the use of "designated" or "registered" contractors, that is contractors approved by the Union. But that means that the same high and inflexible amount is exacted from a violator whether for contracts with a non-Union contractor or a Union contract, whether for contracts with a plant having the best working conditions in the industry or with a plant having the standards of the worst sweat shop.

Even if we were to restrict the application of Article 33(g) to clauses involving the use of contractors, then a whole range of violations would be subject to the same rigid penalty. Thus, in addition to the use of non-Union contractors and the use of "non-designated" or "non-registered" contractors, the following violations obviously of varying importance and effect would also be subject to Article 33(g):

1. The payment of piece rate prices to a contractor's employees, which prices are less than the piece rate prices paid to the "inside shop" employees apparently even if such difference was as low as a cent per dozen (Article 33(c), fol. 38).

2. The sending out of work to contractors when the "inside shop" employees or the employees of a "regular" contractor are not fully supplied with work (Article 32, fol. 43; Article 33(d), fols. 48 and 49).

3. The sending out of work to a contractor engaged exclusively in the business of cutting garments (Article 35).

4. The sending of tracers or markers to contractors without the prior consent of the Union (Article 35).

Moreover, Article 33(g) covers all "garments manufactured or purchased in violation of this agreement", and would therefore apply to any of the numerous and detailed provisions contained throughout the collective bargaining agreement. Nowhere in the contract or anywhere else is there any attempt to determine what damages, if any, might be suffered by the Union or its members as a result of any of the violations described in detail above, or otherwise prohibited by the contract. Instead, all such violations are fitted upon the procrustean bed of the dollar per dozen penalty.

The same justification for the high dollar per dozen damages could just as well be made for a provision calling for five dollars or one hundred dollars or one thousand dollars per dozen liquidated damages.

To allow such a flagrantly punitive clause to stand would make a penalty clause sacrosanct so long as it is embodied in a contract containing an arbitration clause. This means that the long standing public policy against imposing a penalty for breach of a contract would become virtually a dead letter in such contracts. Any party who had sufficient bargaining power to be able to insert

a penalty provision into a contract would also be able to demand an arbitration clause. The arbitrator would then be able to enforce the penalty clause without any judicial objection. In other words, this illegal clause could be enforced merely by also including a broad arbitration clause. We submit that so fundamental a matter of Federal public policy should not be able to be avoided this easily. Precisely to avoid such a result for the future we submit that this Court should grant the writ herein.

We realize that the determination here sought to be reviewed have been considered by three different New York State courts. But the determinations of the state courts herein concern an important aspect of Federal law. The determinations of the New York State courts in this matter are now precedent on Federal law not only for the courts of New York but for all Federal and state courts confronted with a case arising out of collective bargaining agreement. We submit, therefore, that the reasoning of the opinion of Supreme Court, New York County is clearly erroneous and should be overruled by this Court as a misleading and harmful precedent in an important matter of Federal law. In particular, the opinion of Supreme Court, New York County is based upon a total and complete misreading of the contract before it.

That opinion stated that "a fair interpretation of the agreement requires a holding that the liquidated damages clause was intended to apply only where the employer procured garments from concerns not under contract with the union, and that it was not intended to govern where the employer's contractor or vendor was under contract with the union" (fol. 212). The court stated that any

other conclusion was only "a strictly literal construction of the words".

This theory is absolutely contradicted by the wording and structure of the contract. It is Article 32—not Article 33—that prohibits an employer from using non-Union contractors. Article 33 is the provision which requires the employer to use only "designated" or "registered" contractors. (A "non-designated" or "non-registered" contractor can be either unionized or not.) Yet, the penalty clause appears in Article 33 rather than in Article 32. Obviously, if the scope of Article 33(g) was to be limited to the use of non-Union contractors, it would have been inserted in Article 32, the article dealing with the use of non-Union contractors, and not in Article 33, the article that is concerned with the elaborate provisions about "designated" and "registered" contractors.

But further, the words of Article 33(g) itself disprove the rationale of the court below. That clause begins as follows:

> "The parties acknowledge that should the Employer *have any work performed in non-designated or non-registered contractors' shops*, or purchase any garment contrary to the terms of this agreement * * *" (Emphasis supplied.)

Thus, the Article itself makes clear what it was primarily designated for—the use of "non-designated" or "non-registered" contractors regardless of whether or not they were Union contractors.

The court below also supports its interpretation by stating that this was the construction placed on Article 33(g) by the Arbitrator and that his construction is controlling (fol. 215). But nowhere in the Arbitrator's award is there any limitation on the scope of Article 33(g).

Instead, the Arbitrator merely enforced the article as it appears on its face without attempting to interpret it in any way. Hence, Article 33(g) was construed only by the court below and now by the arbitrator.

Thus, the factual premise for the opinion of the court below is completely invalid. Article 33(g) unmistakably applies to any use of "non-designated" or "non-registered" contractors, regardless of whether or not these contractors are unionized. Indeed, by its terms, Article 33(g) also applies to each and every other violation of a long and detailed collective bargaining agreement. Significantly, at no point in its briefs in the state proceedings did the Union attempt to justify this position of the opinion of Supreme Court, New York County. It tried to justify the damages imposed by Article 33(g) as fair for the breach of the provision prohibiting the use of non-Union contractors. But it made no attempt to show that this was the only clause to which those damages applied or that every breach of each and every one of these clauses would likely entail damages of a dollar per dozen to the Union.

In summary, we are presenting to this Court a situation where the public policy against the imposition of a penalty for breach of contract was clearly ignored by the courts below. We submit, therefore, that this Court should grant the writ requested in order to generally restate this public policy with respect to collective bargaining agreements and to overrule the contrary precedent of the New York Courts.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

EDWARD C. WALLACE,
Attorney for Petitioner;
60 East 42nd Street,
New York 17, N. Y.

Of Counsel:
ROBERT TODD LANG,
MARSHALL C. BERGER,
WEIL, GOTSHAL & MANGES.

APPENDIX A

Opinion in Penalty Clause Proceeding

Petitioner employer moves to vacate an arbitrator's award which directed it to pay $1 per dozen to respondent by non-union contractors in violation of the collective agreement. Respondent cross-moves to confirm the award and for the entry of judgment thereon.

The contentions of the petitioner are (1) that the provisions of the collective agreement sought to be enforced by respondent are illegal as violations of the anti-trust laws, (2) that the contractual provision for liquidated damages of $1 per dozen is in fact a provision for a penalty, and (3) that the arbitrator was guilty of misconduct in conducting an independent investigation without petitioner's knowledge.

The provisions of paragraphs 32 and 33 of the agreement require employers to use only union contractors registered by the employer with the union. These provisions do not violate the anti-trust laws (Allen Bradley Co. v. Union, 325 U. S. 797; Matter of Terry Lee [Sportswear], N. Y. County Clerk's No. 12801-1956, aff'd 3 App. Div. 2d 649; see fols. 69-70 of record on appeal; see also Mencher v. B. Geller & Sons, Inc., 276 App. Div. 556; Davis Pleating and Button Co. v. California Sportswear and Dress Association, 145 F. Supp. 864). It is true that a different conclusion might be necessary if the contractual provision was used for the purpose of enabling certain employers or businesses to monopolize the market

and the union was a co-conspirator with them (Allen Bradley v. Local 3, supra). However, no competent proof to that effect has been submitted to the court. The indictment of the union does not constitute competent proof, for it is merely an unproved accusation or charge (Greenstein v. Nat. Skirt and Sportswear Ass'n, Inc., et al., 178 F. Supp. 681).

Nor do the contractual provisions in question violate the Landrum-Griffin Act (P. L. 86-257, 66th Congress). That statute specifically exempted from its proscriptions, union agreements with firms "in the relation of a jobber, manufacturer, contractor or subcontractor working on the goods or premises of the jobber or manufacturer *or performing parts of an integrated process of production in the apparel and clothing industry*" (emphasis supplied), the industry here involved.

The provision of paragraph 33g of the collective agreement for "liquidated" damages of $1 per dozen for blouses manufactured in violation of the agreement does not appear to be one for a penalty. The paragraph provides that the employer recognizes the adverse effect of violations upon the interests of the union and its members and that he acknowledges "that the damage to the union upon such violations is difficult if not impossible of accurate ascertainment." The fact that the parties denominated the damages as "liquidated" and expressly provided that the $1-per-dozen damages clause was not a provision for a "penalty" is not, it is true, conclusive. It is obvious, however, and the arbitrator has so found, that the calculation of the precise and exact damage to the union is a difficult, if not impossible, task. Although a provision for

liquidated damages may be held to be a penalty if the damages fixed are grossly disproportionate to any damages which could reasonably be anticipated, the burden is on the party asserting that the provision is a penalty to establish such gross disproportion (Knoblauch v. Little Falls Dye Co., Inc., 241 App. Div. 910; Perma-Stone Bi County Corp'n v. Ackerman, 15 Misc. 2d 640, aff'd. 8 App. Div. 2d 731). Petitioner has not attempted to meet this burden.

Petitioner relies upon the case of Seidlitz v. Auerbach (230 N. Y. 167), which held that a clause of a lease which purported to fix a specified amount as "liquidated damages" was in fact a penalty because the same amount of "liquidated damages" was to apply for breach of each and every covenant of the lease, although some of the covenants were of slight importance and the loss resulting from their breach (p. 173) "will be clearly disproportionate to the sum sought to be fixed as liquidated damages." However, in Hackenheimer v. Kurtzmann (235 N. Y. 57), in an opinion by Judge Andrews, the very judge who wrote the opinion in Seidlitz v. Auerbach (supra), that case was held inapplicable, although (1) under the literal wording of the agreement involved in the later case, the amount fixed as "liquidated damages" was to apply (p. 62) "in case of breach of the agreement herein contained upon the part of the parties of the second part" (emphasis supplied), some of which (p. 65) "are of less importance than others," and (2) the amount fixed as damages was grossly disproportionate to the damage which could result from the breach of such less important covenants. The Court of Appeals disregarded the literal language of the contract, saying (p.

67) "Nor is the use of the word 'agreements' instead of 'agreement' conclusive." The court declared that (p. 66) a "fair interpretation" of the contract required a holding that the liquidated damages were to apply only to the breaches of those covenants or "agreements" which "materially interfered" with the "protection of the valuable good will inherent in the name Kurtzmann." As to the "agreements" of the parties of the second part (pp. 65, 66) to return mail immediately which was directed "to Kurtzmann or to the Kurtzmann Company" and to return within a specified period "all statements furnished to them respecting the business," the court declared that their breach (p. 66) "was not what they (the parties) had in mind." Judge Andrews' opinion declared (p. 67): "Seidlitz v. Auerbach may be pressed to so extreme a conclusion as to make it impossible to draw any contract providing for such (liquidated) damage. * * * This kind of case is one particularly where liquidated damages are suitable because in the nature of things it is impossible to fix those actually incurred." The preceding sentence, it may be noted, is applicable to the collective agreement involved in the instant case.

The reasoning of the case of Hackenheimer v. Kurtzmann, supra, is peculiarly applicable here. The "liquidated damages" fixed in paragraph 33 (g) of the collective agreement are "to be paid for * * * garments manufactured or purchased in violation of this agreement." The prior paragraph of the agreement (32) forbade employers to have garments manufactured by non-union concerns or to purchase them from such concerns, and required them to designate or register such concerns, as provided in paragraph 33. Paragraph 33 requires each employer to

register every concern which produces any garments for such employer and to designate which are "regular" contractors and which are "temporary" contractors, for the purpose of making work available to the former before giving any to the latter (par. 33 [b]). Petitioner argues that the liquidated damages provision would thus govern if the employer permitted a non-registered or non-designated contractor to manufacture for the employer, albeit said contractor was a union contractor. This is true if the collective agreement is given a severely literal construction. However, a fair interpretation of the agreement requires a holding that the liquidated damages clause was intended to apply only where the employer procured garments from concerns not under contract with the union, and that it was not intended to govern where the employer's contractor or vendor was under contract with the union. It was obviously not the purpose of the parties that the liquidated damages clause should apply merely because an employer, though employing a union contractor, failed to "register" or "designate" the latter. Although there are other provisions of paragraphs 32 and 33 for breach of which the "liquidated damages" would have to be paid, under a strictly literal construction of the words (par. 33 [g]) "manufactured or purchased in violation of this agreement," the language at the beginning of the same paragraph indicates that the "liquidated damages" were intended to be paid only "should the Employer have any work performed in non-designated or non-registered contractors' shops or purchase any garments contrary to this agreement." As previously observed, though the last quoted language uses the words "non-

designated or non-registered contractors," the parties seem to have intended them to mean non-union contractors. The question of whether contractors were registered or designated was obviously of minor importance as compared to the question of whether they were union or non-union. It is to be noted that the proper construction of paragraph 33(g) was for the arbitrator, not the court, and that his interpretation is controlling if there is any rational basis for it. Certainly it cannot properly be held that it was beyond his powers to construe the liquidated damages clause as intended to be applicable only if goods were permitted to be manufactured by or purchased from non-union firms, and as not applying to other violations of the collective agreement.

Petitioner's contention, that the arbitrator must have made an independent investigation, without its knowledge, is predicted upon its claim that there was no evidence before the arbitrator to support his findings (1) that the violation had an adverse effect on the union and its members in the establishment and maintenance of the labor standards provided for in the collective agreement, (2) that "there was equality of opportunity for (the parties') understanding and insisting upon their rights," and (3) that "the $1.00 per dozen is not disproportionate to the injury to the Union" (reply brief of petitioner, pp. 4-5), or to support other statements of the arbitrator. The other statements, last referred to, are adequately supported by an examination of the collective agreement, and, in any event, are not material. Finding 1 (supra) does not indicate that the arbitrator must have conducted an independent investigation. In the absence of a claim of duress it is not material whether this inference of the

arbitrator was supported by evidence. Finding 3 likewise does not necessarily indicate that the arbitrator made an independent investigation. The fact that here may be no evidence to support it justifies, at most, a disregard of the finding. This would, however, not require vacatur of his award (which, incidentally, is not sought on that ground) in view of the fact that petitioner made no attempt to meet its burden of showing that the $1-per-dozen damages were grossly disproportionate to the union's actual damage. The court holds that there is no proof that the arbitrator made an independent investigation.

The motion to vacate is accordingly denied, and the cross-motion granted.

Settle order.

APPENDIX B

Opinion in Health & Welfare Proceeding

Petitioner-union moves to confirm an arbitrator's award of $22,460.82 to it. Respondent-employer cross-moves to vacate the award on three grounds: (1) that the arbitrator refused to issue a subpoena for the production of material evidence and also refused to hear material evidence; (2) that articles 9 and 10 of the collective bargaining agreement are illegal as violations of the anti-trust laws of the United States and New York State; and (3) that said articles are illegal as violations of section 302 of the Labor Management Relations Act.

The award was based upon respondent's obligation, under the collective bargaining agreement between an assosciation of employers (of which respondent had been a member) and the union, to make certain payments to the union's Health and Welfare Fund.

Paragraph 9 of the collective agreement required respondent to pay to the Health and Welfare Fund stipulated percentages of the total weekly payrolls "of all its employees covered by this agreement" and also specified percentages of "the face amount of the bills of its contractors."

Respondent contends that the vast bulk of the arbitrator's award relates to moneys claimed by the union upon the basis of payments made by respondent on the bills of non-union contractors, whose employees cannot receive any benefits from the Health and Welfare Fund. Although the collective agreement requires respondent to employ only union contractors, the provision for payments to the fund of a percentage of contractors' bills is not limited to the bills of union contractors but is broad enough to apply to

the bills of all contractors, whether union or non-union. Limiting the required payments to percentages of the bills of union contractors would enable respondent to whittle away and even abrogate its obligation to make payments to the fund by employing non-union contractors in violation of the agreement. Clearly the arbitrator did not exceed his powers in finding that the percentages of contractors' bills required to be paid to the fund applied to the bills of non-union as well as union contractors. This is apparently recognized by respondent's attorneys, for their only claim, apart from that of illegality, is that the arbitrator erred in preventing respondent from adducing evidence that the union had failed to claim from some other employers percentages of the bills of their non-union contractors. The purpose of the subpoena was to establish the failure of the union, in the case of certain other employers, to make similar claims to that asserted here. The arbitrator refused to issue the subpoena and excluded the proposed evidence on the ground that it would be immaterial and irrelevant. He obviously construed the agreement as requiring payments on the bills of all contractors, regardless of whether they were or were not union contractors. Such a construction of the agreement was well within his province. It was also within his province to take the view that evidence that the union, in some instances, had not made similar claims against other employers, did not affect the proper meaning of the contract or constitute a waiver of the contractual obligation as to all other employers, including respondent. In the circumstances, it was within his discretion to refuse to issue the subpoena or receive the proposed evidence. Since

the proper construction of the collective agreement was for the arbitrator to determine and since his construction thereof had ample basis and cannot be held to be capricious, his rulings as to the admissibility of evidence, justified by his interpretation of the agreement, do not constitute a refusal to hear material and pertinent evidence.

The contention that the obligation to make payments to the health and welfare fund violated anti-trust laws is not supported by any evidence. The claim that the union is a participant in an anti-trust conspiracy and that various provisions of the collective agreement are, therefore, unenforceable is considered and rejected on a companion motion, decided simultaneously herewith.

Respondent also contends that section 302 of the Labor-Management Relations Act is violated, because the employees of the non-union contractors can receive no benefit from the health and welfare fund. The authorities are to the contrary (Budget Dress Corp'n v. Joint Board, 198 F. Supp. 4, aff'd. 299 F. 936; Minkoff v. Scranton Frocks, 181 F. Supp. 542, aff'd. 279 F. 2d 115; Kreindler v. Clarise Sportswear Co., 184 F. Supp. 182).

For the reasons indicated, the motion to confirm is granted and the cross-motion denied. Settle Order.

APPENDIX C

Orders Appealed From

At a Special Term, Part I, of the Supreme Court of the State of New York, held in and for the County of New York, at the Courthouse thereof, Pearl and Centre Streets, in the Borough of Manhattan, City of New York, on the 19 day of October, 1962.

Present—Honorable SAUL S. STREIT, Justice.

Index No. 12464/62

In the Matter of the Arbitration of Controversies between

JUDY BOND, INC.,

Petitioner,

and

CHARLES KREINDLER, as Financial Secretary of BLOUSE AND WAISTMAKERS' UNION, LOCAL 25, I.L.G.W.U.,

Respondent.

Petitioner having moved this Court by notice of motion dated July 19, 1962, for an order vacating and setting aside the award of George J. Mintzer, as arbitrator, dated and acknowledged July 10, 1962; and respondent having moved this Court by cross-motion dated August 28, 1962,

for an order confirming the aforesaid award and directing that judgment be entered thereon; and said motion and cross-motion having duly come on to be heard on the 20th day of September, 1962; and Weil, Gotshal & Manges, attorneys for petitioner, having appeared in support of said motion and in opposition to said cross-motion, and Lieberman, Katz & Aronson, attorneys for respondent, having appeared in support of said cross-motion and in opposition to said motion;

Now, upon reading and filing the aforesaid notice of motion dated July 19, 1962, the petition of Judy Bond, Inc., verified the 18th day of July, 1962, submitted in support of said motion, together with proof of due service thereof; and upon reading and filing the aforesaid notice of cross-motion dated August 28, 1962, and the affidavits of Charles Kreindler, sworn to the 28th day of August, 1962, submitted in support of said cross-motion and in opposition to said motion, together with proof of due service thereof; and upon the aforesaid award of George J. Mintzer, dated and acknowledged July 10, 1962; and upon the decision of the Court filed herein; it is

Now, on motion of Lieberman, Katz & Aronson, attorneys for the respondent,

ORDERED, That the aforesaid motion of petitioner herein be, and the same hereby is, in all respects denied; and it is further

ORDERED, That the aforesaid cross-motion of respondent herein be, and the same hereby is, in all respects granted; and it is further

Appendix C

ORDERED, That the aforesaid award of George J. Mintzef, as arbitrator, dated and acknowledged July 10, 1962, whereby it is determined and awarded that petitioner, Judy Bond, Inc. is directed to pay to respondent the sum of $61,100.00, &c. and the same hereby is, in all respects confirmed; and it is further

ORDERED, That respondent, Charles Kreindler, as Financial Secretary of Blouse and Waistmakers' Union, Local 25, I.L.G.W.U., of 275 Seventh Avenue, New York, New York, have judgment upon said award against petitioner, Judy Bond, Inc., of 1375 Broadway, New York, New York, in the amount of Sixty-One Thousand One Hundred ($61,100.00) Dollars; and it is further

ORDERED, That the Clerk of this Court is directed to enter this order as a judgment, and that respondent have execution thereon.

Enter,

/s/ S. S. S.
J. S. C.

/s/ JAMES McGUIRRIN,
Clerk

Appendix C

At a Special Term, Part 1, of the Supreme Court of the State of New York, held in and for the County of New York, at the Courthouse thereof, Pearl and Centre Streets, in the Borough of Manhattan, City of New York, on the 18 day of October, 1962.

Present—Honorable SAUL S. STREIT, Justice.

Index No. 13628/62

In the Matter of the Arbitration of Controversies between

CHARLES KREINDLER, as Financial Secretary of BLOUSE AND WAISTMAKERS' UNION, Local 25, I.L.G.W.U.,

Petitioner,

and

JUDY BOND, INC.,

Respondent.

Petitioner having moved this Court by notice of motion dated August 6, 1962, for an order confirming the award of George J. Mintzer, as arbitrator, dated and acknowledged July 10, 1962, and directing that judgment be entered thereon; and respondent having moved this Court by notice of cross-motion dated September 10, 1962, for an order vacating and setting aside said award; and said motion and cross-motion having duly come on to be heard

on the 20th day of September, 1962, and Lieberman, Katz & Aronson, attorneys for petitioner, having appeared in support of said motion and in opposition to said cross-motion, and Weil, Gotshal & Manges, attorneys for respondent, having appeared in support of said cross-motion and in opposition to said motion;

Now, upon reading and filing the aforesaid notice of motion dated August 6, 1962, the affidavit of Charles Kreindler, sworn to the 2nd day of August, 1962, and the affidavit of Martin Sommer, sworn to the 19th day of September, 1962, submitted in support of said motion and in opposition to said cross-motion, together with proof of due service thereof; and upon reading and filing the aforesaid notice of cross-motion dated September 10, 1962, and the petition of Judy Bond, Inc., verified the 12th day of September, 1962, submitted in support of said cross-motion and in opposition to said motion, together with proof of due service thereof; and upon the aforesaid award of George J. Mintzer, dated and acknowledged July 10, 1962; and upon the decision of the Court filed herein; it is

Now, on motion of Lieberman, Katz & Aronson, attorneys for petitioner,

ORDERED, That the aforesaid motion of petitioner herein be, and the same hereby is, in all respects granted; and it is further

ORDERED, That the aforesaid cross-motion of respondent herein be, and the same hereby is, in all respects denied; and it is further

Appendix C

ORDERED, That the aforesaid award of George J. Mintzer, as arbitrator, dated and acknowledged July 10, 1962, whereby it is determined and awarded that respondent, Judy Bond, Inc., is directed to pay to petitioner the sum of $22,460.82 be, and the same hereby is, in all respects confirmed; and it is further

ORDERED, That petitioner, Charles Kreindler, as Financial Secretary of Blouse and Waistmakers' Union, Local 25, I.L.G.W.U., of 275 Seventh Avenue, New York, New York, have judgment on said award against the respondent, Judy Bond, Inc., of 1375 Broadway, New York, New York, in the sum of Twenty-Two Thousand Four Hundred Sixty and 82/100ths ($22,460.82) Dollars; and it is further

ORDERED, That the Clerk of this Court is directed to enter this order as a judgment, and that petitioner have execution thereon.

Enter,

/s/ S. S. S.
J. S. C.

/s/ JAMES MCGUIRRIN
Clerk